Filed 3/26/12 P. v. Cambra CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JAMES CAMBRA, JR., Defendant and Appellant.	E052398 (Super.Ct.No. SWF028191) OPINION

APPEAL from the Superior Court of Riverside County. Harry A. Staley, Judge. (Retired judge of the Kern Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant James Cambra, Jr., of three counts of lewd and lascivious acts on the body of a child under the age of 14 by force, violence, duress, fear, or menace (counts 1-3—Pen. Code, § 288, subd. (b)(1)). In a bifurcated bench trial thereafter, the court found true allegations defendant had suffered a prior felony strike conviction (Pen. Code, §§ 667, subds. (c) & (e)(1), 1170.12, subd. (c)(1)), a prior one-strike sex crime conviction (Pen. Code, § 667.61, subd. (d)(1)), a prior serious felony conviction (Pen. Code, § 667, subd. (a)(1)), and that he had served a prior prison term within five years of the commission of the instant offenses (Pen. Code, § 667.5). The court sentenced defendant to an aggregate indeterminate term of incarceration of 155 years to life. On appeal, defendant contends the trial court deprived him of his constitutional rights to due process and equal protection by admitting the testimony of a prior victim of sex offenses committed by defendant, pursuant to Evidence Code section 1108 evidence.[1] He further argues the court abused its discretion in admitting the evidence over his section 352 objection. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

The victim (born November 1993) testified she first met defendant when her mother started dating him when the victim was nine and a half years old. Defendant moved into their apartment after dating her mother for a few months. The victim's biological father had left when she was only two months old; defendant and the victim developed a paternal-daughter relationship: "He had that kind of father-like outlook. I kind of thought of him as a dad." She sometimes called defendant "dad."

[1] All further statutory references are to the Evidence Code unless indicated.

At some point after defendant moved in, before the victim turned 10 years old, the two were sitting on the couch in the living room next to one another watching television, while her mother remained in the bedroom. Defendant moved aside the victim's panties and inserted his fingers inside her vagina. The victim asked him to stop and threatened to tell her mother. Defendant told her to be quiet. The victim attempted to get away from defendant, but he held her down with his arm on her stomach. He continued to insert his fingers inside her vagina for approximately 20 minutes, until he jumped away from her when they heard the victim's mother come out of her room. The victim did not tell her mother, because she was afraid defendant would hurt her or her mother.

A week or two later, defendant digitally penetrated the victim's vagina again, but also touched her chest. Soon defendant began touching her in the same manner every night or every other night. Every time it began to occur she would tell defendant "no," or ask him to stop; defendant would tell her to be quiet or shut up. She always attempted to get away from defendant; sometimes she would hit him; defendant would block her hand and hold her down.

Defendant told the victim not to tell her mother because her mother would believe that she was lying and she would get into trouble. The victim did not have a good relationship with her mother because her mother was using drugs. The sexual molestations occurred during the entire duration of her mother's relationship with defendant. Defendant would buy her gifts, treat her nicely, and bake her cookies in between molestations.

When the victim was 12 years old, defendant and her mother ended their relationship. Defendant moved out and the molestations ceased. When the victim was 15 years old, her mother and stepfather saw cuts on her arms and thought she had attempted to commit suicide. The victim had been "cutting" herself with a razor blade. They sent her to a mental hospital. Someone there asked if she had ever suffered any abuse; the victim related her experiences with defendant.

Defendant's daughter (born December 1980) testified that when she was four years old, she moved into her uncle and aunt's house with her father. She slept with defendant on a mattress on the floor in the recreation room. The first night she spent with defendant he inserted his fingers into her vagina. He continued to digitally penetrate her as often as every night for the ensuing five years. Defendant would kneel beside her, wet his fingers by sticking them in his mouth, and insert them inside her. Defendant told her that if she ever told anyone he would get in trouble and be taken away.

On one occasion, defendant asked her to put her mouth on his penis; she refused. On another occasion, when the situation was not as convenient as usual for defendant, he offered her three to five dollars to allow him to touch her; she refused. When she was eight or nine years old, she had a friend come over to spend the night. She told her friend and her mother what defendant had been doing to her because she did not want him to do it to anyone else. The molestations ceased thereafter. Defendant's daughter estimated defendant molested her 250 times a year for the duration of the four to five years over which they occurred. The parties stipulated that on February 27, 1992, defendant pled

guilty to aggravated lewd and lascivious acts on a child under the age of 14, his daughter, in violation of Penal Code section 288, subdivision (b).

DISCUSSION

A. CONSTITUTIONAL CHALLENGES TO SECTION 1108 EVIDENCE

Defendant contends the admission of his daughter's testimony against him violated his constitutional rights to due process and equal protection. However, defendant acknowledges the California Supreme Court rejected a due process challenge to section 1108. (*People v. Falsetta* (1999) 21 Cal.4th 903, 912-922.) Likewise, our sister courts have rejected due process challenges to both section 1108 (*People v. Manning* (2008) 165 Cal.App.4th 870, 877-878; *People v. Schnabel* (2007) 150 Cal.App.4th 83, 86; *People v. Callahan* (1999) 74 Cal.App.4th 356, 365-366; *People v. Regalado* (2000) 78 Cal.App.4th 1056, 1059); and the closely analogous section 1109 (*People v. Rucker* (2005) 126 Cal.App.4th 1107, 1120; *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1095-1096; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1310; *People v. Brown* (2000) 77 Cal.App.4th 1324, 1332-1334; *People v. Hoover* (2000) 77 Cal.App.4th 1020, 1028-1029; *People v. Johnson* (2000) 77 Cal.App.4th 410, 416-420).

Similarly, California appellate courts have previously rejected equal protection challenges to both sections 1108 (*People v. Waples* (2000) 79 Cal.App.4th 1389, 1394-1395 [Fourth Dist., Div. Two]; *People v. Van Winkle* (1999) 75 Cal.App.4th 133, 140-141; *People v. Fitch* (1997) 55 Cal.App.4th 172, 184-185) and 1109 (*People v. Price* (2004) 120 Cal.App.4th 224, 240; *People v. Jennings*, *supra*, 81 Cal.App.4th at pp. 1310-1313.) Moreover, the California Supreme Court more recently reaffirmed the

constitutionality of section 1108 in *People v. Loy* (2011) 52 Cal.4th 46, 60 through 61. We are bound by *Loy* and *Falsetta*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; *People v. Manning*, *supra*, 165 Cal.App.4th at p. 877 [applying doctrine to constitutional challenge against section 1108].) Moreover, at least one panel of the Ninth Circuit Court of Appeals has held that a similar federal rule withstands constitutional scrutiny. (*U.S. v. LeMay* (9th Cir. 2001) 260 F.3d 1018, 1024-1027.) We therefore conclude section 1108 is not unconstitutional.

B. SECTION 352

Regardless of the constitutionality of section 1108, defendant contends the trial court still had discretion to exclude his daughter's testimony pursuant to section 352, as more prejudicial than probative. He maintains the court abused that discretion by permitting the testimony. We disagree.

On September 15, 2010, the People filed a supplemental trial brief seeking admission of defendant's daughter's testimony at trial pursuant to either section 1101 or 1108. The People recounted the substance of defendant's crimes against the victim in substantial similarity to that as testified by her at trial. The People likewise related the essence of defendant's offenses against his daughter similar to that to which she testified at trial. The People claimed defendant had pled guilty to aggravated lewd and lascivious acts against his daughter on April 23, 1992. Nonetheless, distinct from her testimony at trial, the People's offer of proof alleged defendant attempted to bribe his daughter in return for permitting sexual offenses on more than one occasion, slapped her and threw her against the wall if she refused, and that she was regularly hurt from the conduct. The

People's offer of proof did not relate that defendant licked his fingers before placing them inside his daughter's vagina or that he had once asked her to place her mouth on his penis.

At the hearing on the issue, defendant objected only on the basis that under section 352, admission of the testimony would be more prejudicial than probative. In particular, defendant contended the temporal remoteness of the uncharged offense, and the undue consumption of time that proof of the offense would take, warranted against its admission at trial. The People responded that, while technically, defendant's prior offenses were temporally remote, the remoteness was "not because the defendant has lived [a] clean life ever since pleading guilty to a [Penal Code section] 288[, subdivision] (b) [offense] back in 1992 and we haven't heard from him since." The People further observed, "this is not somebody who has remained free from lots of criminal convictions because he's been out on the streets living a good life. The only reason he's pretty much free of any convictions is because he's back in custody and unable to commit crimes."

The court granted the People's request to adduce the testimony of defendant's daughter: "The court doesn't reach this ruling lightly, but they are similar sex acts on children which include putting fingers inside the vagina to the point that the victims would indicate it was painful or it hurt, young girls of similar age, not identical, ages six to ten versus nine to twelve, but it certainly shows an abnormal interest in children of a relatively similar age." The court further reasoned that defendant "did have a relationship with the mother of each victim, one as being a common parent and one as being an on-again off-again boyfriend, and the alleged acts occurred in the home of the victim."

Section 1108 allows the admission of evidence of a defendant's commission of another sexual offense subject to the weighing process of section 352. Under that weighing process, the court considers, among other factors, "(1) whether the propensity evidence has probative value, e.g., whether the uncharged conduct is similar enough to the charged behavior to tend to show the defendant did in fact commit the charged offense; (2) whether the propensity evidence is stronger and more inflammatory than evidence of the defendant's charged acts; (3) whether the uncharged conduct is remote or stale; (4) whether the propensity evidence is likely to confuse or distract the jurors from their main inquiry, e.g., whether the jury might be tempted to punish the defendant for his uncharged, unpunished conduct; and (5) whether admission of the propensity evidence will require an undue consumption of time." (*People v. Nguyen* (2010) 184 Cal.App.4th 1096, 1117.) We review the trial court's ruling to admit evidence pursuant to a section 352 analysis under the deferential abuse of discretion standard. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1008.)

Each of the factors listed above supports the trial court's decision to admit the evidence. The prior act and the charged offenses were sufficiently similar because they all involved violations of Penal Code section 288, subdivision (b), aggravated lewd acts on a child. (See *People v. Frazier* (2001) 89 Cal.App.4th 30, 41, fn. omitted ["It is enough the charged and uncharged offenses are sex offenses as defined in section 1108."].) The prior acts evidence was not any more inflammatory than the acts committed against the victim; all the acts consisted of digital penetration of the respective girls' vaginas. Defendant contends the relative youth of his daughter compared with the

victim made the prior act evidence more inflammatory. However, while defendant's daughter was only four years old when the molestation began, she was approximately nine when it ended. Thus, defendant had committed sexual molestations against both girls when they were about the same age. Moreover, both girls were prepubescent, establishing defendant's predilection for a certain age category of girls against whom he preferred to commit his crimes.

Defendant also maintains his daughter's testimony that he licked his fingers before inserting them, and asked her to put her mouth on his penis, was more inflammatory than the circumstances as testified to by the victim. First, defendant failed to object to the testimony at trial on the basis that it exceeded the People's offer of proof before trial, or reiterate a section 352 objection. Second, we do not find that it was more inflammatory. His daughter noted defendant had only asked her to put her mouth on his penis once; she refused. Thus, it was not of much consequence when considered in the context of her testimony as a whole: that defendant digitally penetrated her vagina 250 times a year for around five years. Likewise, the fact that defendant licked his fingers could be construed as an attempt to lubricate them to reduce the severity of any pain his daughter might incur as a result of his offenses. Thus, it does not have the reflexively negative connotation defendant would ascribe to it.

The prior conviction, although somewhat remote, was not unduly so, particularly considering that defendant had spent much of the intervening time incarcerated. (See *People v. Johnson* (2010) 185 Cal.App.4th 520, 535 ["'[n]o specific time limits have been established for determining when an uncharged offense is so remote as to be

inadmissible.'"]; *People v. Branch* (2001) 91 Cal.App.4th 274, 284 [no time limit established for remoteness (30 year old prior offense.)]; *People v. Waples, supra,* 79 Cal.App.4th at pp. 1393-1395 [uncharged sexual offenses occurring between 15 and 22 years before trial not found too remote]; *People v. Ewoldt* (1994) 7 Cal.4th 380, 405 [passage of 12 years since prior molestation did not "significantly lessen the probative value of [the] evidence"], superseded by statute on other grounds as stated in *People v. Britt* (2002) 104 Cal.App.4th 500, 505.) Defendant's daughter's testimony is susceptible to the reasonable interpretation that the last offense committed against her occurred in 1989 or 1990; she was born in December 1980, testified defendant molested her for five years, and that she was eight or nine years old at the time of the last offense. Defendant was convicted for his behavior with her on February 27, 1992. The victim's testimony is susceptible to the reasonable interpretation that the earliest offense committed against her occurred in 2003; she was born in November 1993 and testified the first offense occurred sometime before she turned 10. Thus, only around 13 years had elapsed since defendant's last offense against his daughter and his first offense against the victim. Only 11 years had elapsed from his conviction for his offenses against his daughter.

Moreover, defendant did not spend this entire period of time free from incarceration; thus, he could not demonstrate a substantial period of time in which he had the opportunity, but refrained from committing the offenses for which the court admitted the section 1108 evidence. Defendant received an eight-year sentence for his conviction derived from the offenses committed against his daughter; he twice violated his parole from that sentence. Defendant went on to incur convictions for nine more offenses

between the time he was released from prison and his trial in the current matter; the convictions included one felony, six misdemeanors, and two infractions. The subsequent felony conviction and four of the misdemeanor convictions occurred before he initiated his offenses against the victim. He was sentenced to three years in prison for the felony, and violated his subsequent parole three times. He was sentenced to 90 days in jail and 36 months probation for the four misdemeanors, and violated his probation twice. Therefore, the prior offenses were not temporally remote when excerpting the time defendant spent incarcerated. (*People v. Daniels* (2009) 176 Cal.App.4th 304, 317 [15-year gap between prior and current offense not too "remote because defendant had been incarcerated for the vast majority of that period."].)

Moreover, the similarities between charged offense and prior may balance out any temporal remoteness. (*People v. Branch*, *supra*, 91 Cal.App.4th at p. 285.) Here, the offenses to which both the victim and defendant's daughter testified were identical. Defendant occupied a paternal relationship with both girls. Defendant bribed both girls in an attempt to have them acquiesce to the abuse. Defendant told both girls not to tell. The prior conviction was not likely to confuse or distract the jury, because the jury was told that the prior incident resulted in a criminal conviction. Thus, the jury was not likely to "be tempted to convict the defendant simply to punish him for the other offenses . . . ." (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 917; see also *Daniels*, *supra*, at p. 317.)

Furthermore, "[t]he jury was given an effective instruction by the trial court to consider the evidence only for proper limited purposes, and we must presume the jury adhered to the admonitions. [Citation.]" (*People v. Hollie* (2010) 180 Cal.App.4th 1262,

1277; CALCRIM 1191 [Evidence of Uncharged Sex Offense].)[2] Finally, minimal time was spent proving the prior offenses. Defendant's daughter's testimony occupies less than 30 pages of the reporter's transcript. We conclude the trial court acted well within its discretion in admitting the challenged evidence.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

McKINSTER
Acting P. J.

RICHLI
J.

[2] "You may consider this evidence only if the People have proved, by a preponderance of the evidence, that the defendant in fact committed the uncharged offenses. [¶] . . . [¶] [I]f the People have not met this burden of proof, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged offenses, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit and did commit the . . . charged or lesser sexual offenses. If you conclude that the defendant committed the uncharged crime, that conclusion is only one factor to consider along with all the other evidence. [¶] It is not sufficient, by itself, to prove that the defendant is guilty of any of the sexual offenses. The People must still prove each charge . . . beyond a reasonable doubt."